No. 94-286

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

FREIGHTLINER CORPORATION,

Petitioner,

v.

BEN MYRICK AND EMILY MYRICK,

Respondents.

NAVISTAR INTERNATIONAL TRANSPORTATION CORP.,

Petitioner,

v.

JACK LINDSEY, Executor of the Estate and Surviving Spouse of Grace C. Lindsey,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF THE AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION AND THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

STATEMENT OF INTEREST 1
SUMMARY OF ARGUMENT 1
ARGUMENT 6
A. The Unique History Of Federal Regulation Of Restraint Systems 6
1. The Safety Act 6
2. The Rich History Of FMVSS 208 7
a. 1972-1975: Congress Prohibits Any Standard Mandating Airbags Unless Submitted To And Not Disapproved By It 7
i. The Ignition Interlock And § 1410b 7
ii. The Options 9
b. 1976-1984: Transportation Secretaries Reject Mandatory Airbags 9
i. 1976: Secretary Coleman 9
ii. 1977-83: Secretaries Adams And Lewis 10
c. 1984-Now: The Rule In Force Today... 11
B. The Eleventh Circuit's Decision Guts The Supremacy Clause And Violates This Court's Preemption Decisions 14
1. State Law That Directly Conflicts With Federal Law Is Preempted By Direct Operation Of The Supremacy Clause..... 14
2. The Safety Act Does Not Save Common-Law Claims That Directly Conflict With Federal Safety Standards 18
C. All Three Branches Of Government Have Found That "No Airbag" Claims Are Preempted..... 21
1. The Courts Have Overwhelmingly Held That FMVSS 208 Preempts "No Airbag" Claims 23

TABLE OF CONTENTS – Continued

Page

a. Ground 1: A State Rule Imposing Damages For Choosing To Install One FMVSS 208 Authorized Restraint System Instead Of Another Punishes The Exercise Of A Federal Option 23

b. Ground 2: Permitting States To Limit The Exercise Of A FMVSS 208 Option Would Destroy The Uniformity The Act Is Meant to Achieve 24

2. The United States Has Stated Its View That FMVSS 208 Preempts "No Airbag" Claims .. 26

3. Congress Expressly Stated Its Intent Not To Change The Preemption Case Law Under FMVSS 208 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Arrow Transp. Co. v. Southern Ry., 372 U.S. 658 (1963) 17

Baird v. General Motors Corp., 654 F. Supp. 28 (N.D. Ohio 1986) 3, 23, 24

Bass v. General Motors Corp., 1987 WL 54449 (W.D. Tex. 1987) 3

BFP v. Resolution Trust Corp., 114 S. Ct. 1757, *reh'g. denied*, 114 S. Ct. 2771 (1994) 16

Boyle v. Chrysler Corp., 501 N.W.2d 865 (Wis. Ct. App. 1993), *rev. denied* 510 N.W.2d 137 (1993) 3, 19, 20

Brown v. Hotel & Restaurant Employees and Bartenders Int'l. Union, 468 U.S. 491 (1984) 15

Buzzard v. Roadrunner Trucking, Inc., 966 F.2d 777 (3d Cir. 1992) 24, 29

California Federal Savings & Loan Assn. v. Guerra, 479 U.S. 272 (1987) 14

Cerniak v. Nissan Motor Corp., 1991 WL 147366 (N.D. Ill. 1991) 3

Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981) 17, 18, 25

Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608 (1993) ..... *passim*

City of New York v. Federal Communications Commission, 486 U.S. 57 (1988) 20

Cox v. Baltimore County, 646 F. Supp. 761 (D. Md. 1986) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

CSX Transp., Inc. v. Easterwood, 113 S. Ct. 1732 (1993) 15

Dallas v. General Motors Corp., 725 F. Supp. 902 (W.D. Tex. 1989) 3, 24

Dykema v. Volkwagenwerk, ___ N.W.2d ___, Nos. 93-1341, 93-2579 (Wis. Ct. App. Nov. 8, 1994) 3

Fidelity Federal Sav. and Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982) 20, 24

Free v. Bland, 369 U.S. 663 (1962) 15

Gade v. National Solid Waste Management Ass'n, 112 S. Ct. 2374 (1992) 16

Gardner v. Honda Motor Co., 536 N.Y.S.2d 303 (N.Y. App. Div. 1988) 3

Gills v. Ford Motor Co., 829 F. Supp. 894 (W.D. Ky. 1993) 3, 19, 20, 21

Heath v. General Motors Corp., 756 F. Supp. 1144 (S.D. Ind. 1991) 3, 20

Hernandez-Gomez v. Leonardo, 1994 WL 593202 (Ariz. Nov. 1, 1994) 4

Hughes v. Ford Motor Co., 677 F. Supp. 76 (D. Conn. 1987) 3, 25, 26

I.N.S. v. Chadha, 462 U.S. 919 (1983) 9

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990) 16

TABLE OF AUTHORITIES – Continued

Page

International Paper Co. v. Ouellette, 479 U.S. 481 (1987) 17, 25

John Hancock Mutual Life Ins. Co. v. Harris Trust & Sav. Bank, 114 S. Ct. 517 (1993) 16, 17

Jones v. Rath Packing Co., 430 U.S. 519, *reh'g. denied*, 431 U.S. 925 (1977) 16

Kelly v. General Motors Corp., 705 F. Supp. 303 (W.D. La. 1988) 3

Kitts v. General Motors Corp., 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 787 (1990) 3, 20, 24, 25, 26

Kolbeck v. General Motors Corp., 702 F. Supp. 532 (E.D. Pa. 1988) 3, 29

Lincoln Sav. and Loan Assn. v. Federal Home Bank Bd., 856 F.2d 1558 (D.C. Cir. 1988) 20

Loulos v. Dick Smith Ford, 1994 WL 66238 (Mo. Ct. App. March 8, 1993), *superseded*, 882 S.W.2d 149 (Mo. Ct. App. May 30, 1994) 4

Malone v. White Motor Corp., 435 U.S. 497 (1978) 14

Marrs v. Ford Motor Co., 852 S.W.2d 570 (Tex. Ct. App. 1993) 3, 20

Miranda v. Fridman, 647 A.2d 167 (N.J. Super. Ct. App. Div. 1994) 3, 19

Montag v. Honda Motor Co., Ltd., 856 F. Supp. 574 (D. Colo., 1994) 3, 19

Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) 6

TABLE OF AUTHORITIES – Continued

Page

Nissan Motor Corp. v. Superior Court (Meier), 212 Cal. App. 3d 980 (Cal. Ct. App. 1989), *cert. denied*, 494 U.S. 1066 (1990) 3, 19, 25

NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974) 28

Northwest Cent. Pipeline Corp. v. Kansas Corp. Comm'n, 489 U.S. 493 (1989) 16

Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986) 17

Pacific Legal Found. v. Department of Transp., 593 F.2d 1338 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979) 10

Pak v. Chrysler Motors Corp., 1990 WL 198821 (E.D. Pa. 1990), *aff'd*, 941 F.2d 1200 (3d Cir. 1991) 3

Palmer v. Liggett Group, Inc., 825 F.2d 620 (1st Cir. 1987) 25

Pennsylvania R.R. v. Puritan Coal Mining Co., 237 U.S. 121 (1915) 18

Pennsylvania v. Nelson, 350 U.S. 497 (1956), *reh'g denied*, 351 U.S. 934 (1956) 17

Phillip v. Hyundai Motor Co., 639 So.2d 1064 (Fla. Ct. App. 1994) 4

Pokorny v. Ford Motor Co., 902 F.2d 1116 (3d Cir.), *cert. denied*, 498 U.S. 853 (1990) 3, 20, 23, 24, 28

Public Citizen v. Steed, 851 F.2d 444 (D.C. Cir. 1988) ..13, 20

Schick v. Chrysler Corp., 675 F. Supp. 1183 (D.S.D. 1987) 3

TABLE OF AUTHORITIES – Continued

Page

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984). ... 16, 17

Staggs v. Chrysler Corp., 678 F. Supp. 270 (N.D. Ga. 1987) 3, 25, 26

State Farm Mut. Auto. Ins. Co. v. Dole, 802 F.2d 474 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 951 (1987) ..*passim*

Surles v. Ford Motor Co., 709 F. Supp. 732 (N.D. Tex. 1988) 3

Swope v. SIT Transit Corp., 796 F. Supp. 160 (E.D. Pa. 1992) 29

T.I.M.E. Inc. v. United States, 359 U.S. 464 (1959). .17, 29

Tammen v. General Motors Corp., 857 F. Supp. 788 (D. Kan. 1994) 3

Taylor v. General Motors Corp., 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990) 2, 3, 19, 24

Texas & Pacific Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907) 16

Tiger v. Western Investment Co., 221 U.S. 286 (1911) 28

Vanover v. Ford Motor Co., 632 F. Supp. 1095 (E.D. Mo. 1986) 3, 19, 26

Vasquez v. General Motors Corp., 1986 WL 18670 (D. Ariz. 1986) 3

Ventura County v. Gulf Oil Corp., 601 F.2d 1080 (1979), *aff'd mem.*, 445 U.S. 947 (1980) 17

Wattelet v. Toyota Motor Corp., 676 F. Supp. 1039 (D. Mont. 1987) 3, 19

TABLE OF AUTHORITIES – Continued

Page

Welsh v. Century Products, Inc., 745 F. Supp. 313 (D. Md. 1990) 21, 29

Wickstrom v. Maplewood Toyota, Inc., 416 N.W.2d 838 (Minn. Ct. App. 1987), *cert. denied*, 487 U.S. 1236 (1988) 3, 19, 24, 25, 26

Wood v. General Motors Corp., 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990) ..... *passim*

FEDERAL STATUTES, RULES AND REGULATIONS

15 U.S.C. § 1410 ..... 8, 21

15 U.S.C. § 1410b 7, 8, 9, 21, 23

National Motor Vehicle Safety Act, 49 U.S.C. § 30101 *et seq.* (formerly codified at 15 U.S.C. § 1381 *et seq.*) 2, 20

49 U.S.C. § 30103(b) (formerly codified at 15 U.S.C. § 1392(d)) 7, 19, 25

49 U.S.C. § 30103(e) (formerly codified at 15 U.S.C. 1397(k)) 7, 18, 19

49 U.S.C. § 30111 (formerly codified at 15 U.S.C. § 1392(a)) 6, 20

Department of Transportation and Related Agencies Appropriation Act, 1980, Pub. L. No. 95-335, § 317, 93 Stat. 1023 (1978) 11

Department of Transportation and Related Agencies Appropriation Act, 1979, Pub. L. No. 96-131, § 317, 92 Stat. 435 (1979) 11

Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, § 2508 (1991) 13, 28

Federal Motor Vehicle Safety Standard 208 ("FMVSS 208"), 49 C.F.R. § 571.208 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

LEGISLATIVE AND REGULATORY HISTORY

120 Cong. Rec. 27816 (1974) 8

120 Cong. Rec. 36924 (1979) 11

32 Fed. Reg. 2409 (1967) 7

39 Fed. Reg. 38380 (1974) 9

41 Fed. Reg. 24070 (1976) 9, 10

41 Fed. Reg. 36494 (1976) 9

42 Fed. Reg. 5071 (1977) 9

42 Fed. Reg. 34290 (1977) 10

46 Fed. Reg. 12033 (1981) 11

46 Fed. Reg. 21174 (1981) 11

46 Fed. Reg. 53419 (1981) 11

49 Fed. Reg. 28962 (1984) 11, 12, 13

52 Fed. Reg. 10096 (1987) 13

52 Fed. Reg. 42440 (1987) 13

H.R. Rep. No. 1776, 89th Cong., 2d Sess. 17 (1966) 6

H.R. Rep. No. 1452, 93d Cong., 2d Sess. 44-45 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6084, 6108 8

H.R. Conf. Rep. No. 404, 102d Cong., 1st Sess. 403 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1679, 1783 28

H.R. Rep. No. 108, 103d Cong., 2d Sess. 3 (1994), *reprinted in* 1994 U.S.C.C.A.N. 818 7

TABLE OF AUTHORITIES – Continued

Page

S. Rep. No. 1301, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2712, 2720 6

The Secretary's Decision Concerning Vehicle Occupant Crash Protection, D.O.T., Dec. 6, 1976 9

OTHER AUTHORITIES

Brief for the United States as Amicus Curiae, *Wood v. General Motors Corp.*, No. 89-46 (S. Ct., filed March 1990) 4

I. STATEMENT OF INTEREST

The American Automobile Manufacturers Association (AAMA) is a non-profit national trade organization. Its member companies, Chrysler Corporation, Ford Motor Company and General Motors Corporation, are principally engaged in the production and sale of motor vehicles.

The Association of International Automobile Manufacturers, Inc. (AIAM) is a trade association organized as a non-profit District of Columbia corporation representing the U.S. subsidiaries of international automobile companies. AIAM's member companies[1] distribute passenger cars, multipurpose passenger vehicles and light trucks in the U.S.[2]

Amici have a vital interest in the effect this decision may have on their members' exercise of federal options granted to them by Federal Motor Vehicle Safety Standard 208.

II. SUMMARY OF ARGUMENT

The majority of a sharply divided Eleventh Circuit panel set out to follow this Court's decision in *Cipollone*,[3] but went astray. It read *Cipollone* to mean that whenever an Act contains an express preemption statement that does not address a particular conflict between state law and the Act or regulations promulgated under it, the Supremacy Clause is powerless to preempt state law that flatly conflicts with the Act or regulations, or even state law that makes it impossible to comply with the Act or regulations. That reading of *Cipollone*, however, is clearly wrong; it is at odds with settled

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[1] AIAM members include American Honda Motor Co., American Suzuki Motor Corporation, BMW of North America, Inc., Fiat Auto U.S.A., Inc., Hyundai Motor America, Isuzu Motors America, Inc., Kia Motors America, Inc., Land Rover North America, Inc., Mazda Motor America, Inc., Mitsubishi Motor Sales of America, Inc., Nissan North America, Inc., Porsche Cars North America, Inc., Rolls-Royce Motor Cars, Inc., Subaru of America, Inc., Toyota Motor Sales, U.S.A., Inc., Volkswagen of America, Inc., and Volvo North America Corporation.

[2] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court. *See* Sup. Ct. R. 37.

[3] *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1993).

law that is as old as the Republic. For it ignores a century or more of Supreme Court precedent holding that conflicting state law falls by "direct operation of the Supremacy Clause," and that even where a savings clause shows Congress's intent ***not*** to preempt, state law that directly conflicts with federal law is implicitly preempted. *Cipollone* did not address that precedent, much less purport to overrule it.

In reading *Cipollone* to foreclose any inquiry into any conflict between state and federal law, the court of appeals created a rule that turns the Supremacy Clause on its head. For under that rule, courts may not even inquire into, let alone prevent, conflicts between state and federal law, no matter what the federal law, no matter what the state law, and no matter how clear or severe the conflict between them. The upshot is that state law prevails over federal law – the opposite of what the Supremacy Clause commands.

The mischief wrought by the rule was proved in *Myrick* itself. In *Myrick*, the issue was whether a state common-law claim concerning truck brake design conflicted with Federal Motor Vehicle Safety Standard ("FMVSS") 121, the federal brake standard promulgated under the National Traffic and Motor Vehicle Safety Act,[4] and was, therefore, preempted. The court of appeals held itself bound to allow the common law claim to go forward, regardless of whether it flatly conflicted with, and undermined, federal law. But *Myrick* did not stop there. It went on to hold that its *Cipollone*-inspired injunction against implied conflict preemption analysis "supersede[d]" its earlier finding of preemption in another case, *Taylor*,[5] involving a different FMVSS and different claims, not before the *Myrick* court.

That different FMVSS – FMVSS 208[6] – grants manufacturers express restraint system design options, including the option to install seat belts instead of airbag in cars. Those

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[4] 49 U.S.C. § 30101 *et seq.* (formerly codified at 15 U.S.C. § 1381 *et seq.*).

[5] *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990).

[6] 49 C.F.R. § 571.208.

different claims – so-called "no airbag" claims – seek to impose liability on a manufacturer for exercising one option granted by FMVSS 208 (like the seat belt option) instead of another (like the airbag option).[7] Over a decade, an essentially unanimous body of case law[8] found that that regulation

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[7] FMVSS 208 grants manufacturers a variety of choices among belt systems and airbags. Thus, not all claims that challenge the chosen option, and seek a different one, are "no airbag" claims. *See, e.g., Miranda v. Fridman*, 647 A.2d 167 (N.J. Super. Ct. App. Div. 1994) (FMVSS 208 and Safety Act preempt a claim that would take away two-point belt option and require exercise of three-point belt option); *Dykema v. Volkwagenwerk*, ___ N.W.2d ___, Nos. 93-1341, 93-2579 (Wis. App. Nov. 8, 1994) (same). We refer to these claims as "no airbag" claims, however, for simplicity, because the case law so describes them, and because most of them seek to mandate the airbag option.

[8] *See, e.g., Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), *cert. denied*, 498 U.S. 853 (1990); *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 787 (1990); *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990); *Dykema v. Volkwagenwerk*, ___ N.W.2d ___, Nos. 93-1341, 93-2579 (Wis. Ct. App. Nov. 8, 1994); *Miranda v. Fridman*, 647 A.2d 167 (N.J. Super. Ct. App. Div. 1994); *Boyle v. Chrysler Corp.*, 501 N.W.2d 865 (Wis. Ct. App. 1993), *rev. denied* 510 N.W.2d 137 (1993); *Marrs v. Ford Motor Co.*, 852 S.W.2d 570 (Tex. Ct. App. 1993); *Nissan Motor Corp. v. Superior Court (Meier)*, 212 Cal. App. 3d 980 (Cal. Ct. App. 1989), *cert. denied*, 494 U.S. 1066 (1990); *Gardner v. Honda Motor Co.*, 536 N.Y.S. 2d 303 (N.Y. App. Div. 1988), *motion for reargument denied* (Mar. 10, 1989); *Wickstrom v. Maplewood Toyota, Inc.*, 416 N.W.2d 838 (Minn. Ct. App. 1987), *cert. denied*, 487 U.S. 1236 (1988); *Montag v. Honda Motor Co., Ltd.*, 856 F. Supp. 574 (D. Colo., 1994); *Tammen v. General Motors Corp.*, 857 F. Supp. 788 (D. Kan. 1994); *Gills v. Ford Motor Co.*, 829 F. Supp. 894 (W.D. Ky. 1993); *Heath v. General Motors Corp.*, 756 F. Supp. 1144 (S.D. Ind. 1991); *Kelly v. General Motors Corp.*, 705 F. Supp. 303 (W.D. La. 1988); *Dallas v. General Motors Corp.*, 725 F. Supp. 902 (W.D. Tex. 1989); *Surles v. Ford Motor Co.*, 709 F. Supp. 732 (N.D. Tex. 1988); *Kolbeck v. General Motors Corp.*, 702 F. Supp. 532 (E.D. Pa. 1988); *Staggs v. Chrysler Corp.*, 678 F. Supp. 270 (N.D. Ga. 1987); *Hughes v. Ford Motor Co.*, 677 F. Supp. 76 (D. Conn. 1987); *Wattelet v. Toyota Motor Corp.*, 676 F. Supp. 1039 (D. Mont. 1987); *Schick v. Chrysler Corp.*, 675 F. Supp. 1183 (D.S.D. 1987); *Baird v. General Motors Corp.*, 654 F. Supp. 28 (N.D. Ohio 1986); *Cox v. Baltimore County*, 646 F. Supp. 761 (D. Md. 1986); *Vanover v. Ford Motor Co.*, 632 F. Supp. 1095 (E.D. Mo. 1986); *Cerniak v. Nissan Motor Corp.*, 1991 WL 147366 (N.D. Ill. 1991); *Pak v. Chrysler Motors Corp.*, 1990 WL 198821 (E.D. Pa. 1990), *aff'd*, 941 F.2d 1200 (3d Cir. 1991); *Bass v. General Motors Corp.*, 1987 WL 54449 (W.D. Tex. 1987); *Vasquez v. General Motors Corp.*, 1986 WL 18670-71 (D. Ariz. 1986).

preempted those claims, for good reason: A state common-law claim that imposes damages on a manufacturer for exercising one federally-granted option instead of another would in effect take the option away, would risk killing or severely retarding the development of restraint systems, and so would flatly conflict with federal law, frustrate its purpose, and disserve the safety purposes of the Act. The Supremacy Clause forbids that.

Although it did not concern FMVSS 208 or "no airbag" claims, *Myrick* nonetheless unsettled that settled "no airbag" law. Post-*Myrick*, several courts have declined to find preemption of "no airbag" claims. Those courts did not dispute the direct conflict between FMVSS 208 and "no airbag" claims; rather, based on *Myrick*, they found conflict preemption is foreclosed in spite of the direct conflict.[9]

Amici – associations representing the automobile manufacturing industry – urge the Court to reverse the court of appeals' decision, and respectfully caution the Court, whatever the disposition of this case or the FMVSS 121 brake claims that are ultimately the subject of it, not to inadvertently decide the "no airbag" preemption issue. Whether a given claim based upon a state law conflicts with and frustrates a federal law necessarily turns on the claim, the state law, and the federal law. Thus the preemptive effect of other FMVSSs on other kinds of claims should not, and necessarily cannot, determine the effect of FMVSS 208 on "no airbag" claims. Indeed, the airbag issue underscores the vice of *Myrick*; it prevents even asking the questions about conflict between state and federal law that the Supremacy Clause answers.

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[9] Indeed, one court first found a direct conflict and preemption, and then reversed its preemption finding based on *Myrick*. *See Loulos v. Dick Smith Ford*, 1994 WL 66238 (Mo. Ct. App. March 8, 1993), superseded by 882 S.W.2d 149 (Mo. Ct. App. May 30, 1994). *See also Phillip v. Hyundai Motor Co.*, 639 So. 2d 1064 (Fla. Ct. App. July 12, 1994) (no preemption based on *Myrick*) (cert. petition pending); *Hernandez-Gomez v. Leonardo*, 1994 WL 593202 (Ariz. Nov. 1, 1994) (no preemption based on *Myrick*).

All three branches of government have asked the questions with respect to "no airbag" claims, and agree on the answer the Supremacy Clause compels: FMVSS 208 preempts them. Over 120 courts, including every circuit to address the issue, held with unprecedented unanimity (before *Myrick*) that FMVSS 208 is, in the language of the case law, "unique," and preempts even though other FMVSSs may not. As for the executive branch, at this Court's invitation, the Solicitor General, joined by counsel for the Department of Transportation and NHTSA,[10] advised the Court that allowing common-law claims that in effect take away FMVSS 208 options would "obviously eliminate the diversity that the secretary found necessary," would "*disserve* the *safety* purposes of the Act," and so would "stand as an obstacle" to the agency's objectives, in fact "drastically" interfere with them. Brief for the United States as Amicus Curiae, *Wood v. General Motors Corp.*, No. 89-46 (S. Ct., filed March 1990), at 14, 15 (original emphasis). Congress, for its part, has stated its intent not to "alter, change or modify in any way" the case law finding "no airbag" claims preempted. Pp. 21-28, below.

FMVSS 208 preemption is critical to the automotive industry. Claims that take away federally-granted FMVSS 208 options, if allowed, would turn every car accident on the road into a potential tort case, and a jury-by-jury referendum on the federal safety policy embodied in FMVSS 208. Every car is equipped with a restraint system authorized under FMVSS 208. Every person injured in every accident could claim that a different FMVSS 208 option should have been chosen in her car, and seek to punish the manufacturer for choosing an option federal law found essential to meeting the safety goal. Limitless ad-hoc second-guessing of FMVSS 208 would destroy the options that the Department of Transportation judged the best means to achieve that goal. That destruction of federal goals should not be permitted, especially as an unintended consequence of the Court's disposition of *Myrick*.

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[10] National Highway Traffic Safety Administration.

III. ARGUMENT

We chronicle the regulatory history of FMVSS 208 and set forth the preemption law applicable to it to demonstrate three propositions: (1) *Myrick*'s prohibition of implied conflict preemption analysis makes no sense when state law flatly conflicts with federal law; (2) whether state and federal law conflict in any case turns on the particular state law, federal law, and the effect of one on the other; and (3) "no airbag" claims flatly conflict with federal law, and they are therefore preempted. *Myrick*'s disposition ought not to affect that truth.

A. The Unique History Of Federal Regulation Of Restraint Systems

1. The Safety Act

In 1966 Congress determined that, given the "centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States," the country needed motor vehicle safety standards that were "strong and adequately enforced," and "*uniform* throughout the country." S. Rep. No. 1301, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720 (emphasis added); *see* H.R. Rep. No. 1776, 89th Cong., 2d Sess. 17 (1966). Therefore it concluded that "the primary responsibility for regulating the national automotive manufacturing industry must fall squarely upon the Federal Government." S. Rep. No. 1301 in 1966 U.S.C.C.A.N. at 2712; *Wood*, 865 F.2d at 397-98.

Accordingly, Congress enacted the Safety Act. The Act directs the Department of Transportation and its subdivision, NHTSA, to issue federal motor vehicle safety standards that are "practicable," "meet the need for motor vehicle safety," and apply throughout the country. 49 U.S.C. § 30111 (formerly codified at 15 U.S.C. § 1392(a)). The "task called for considerable expertise." *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 33 (1983).

When the Department establishes a federal standard, the Safety Act expressly preempts state safety "standards" as to "the same aspect of performance" that are not "identical to

the [federal] standard." 49 U.S.C. § 30103(b) (formerly codified at 15 U.S.C. § 1392(d)).[11] The Act also states, in a section denominated "common law liability," that compliance with a federal standard "does not exempt a person from liability at common law." 49 U.S.C. § 30103(e) (formerly codified at 15 U.S.C. 1397(k)). However, that provision is not denominated a preemption clause; structurally is not part of the preemption clause; and on its face says nothing about preemption, much less purports to preclude preemption of claims based on a non-identical common-law standard that directly conflicts with a federal standard. *See* pp. 18-20, below.

2. The Rich History Of FMVSS 208

FMVSS 208 is the occupant restraint standard. Options and flexibility are the heart of FMVSS 208, and have been for at least twenty years.

The Department first adopted FMVSS 208 in 1967. It required installation of manual lap belts in all new cars. 32 Fed. Reg. 2409, 2415 (1967). FMVSS 208 has had a rich and special history since then.

a. 1972-1975: Congress Prohibits Any Standard Mandating Airbags Unless Submitted To And Not Disapproved By It.

i. The Ignition Interlock And § 1410b.

"[T]he safety benefits of wearing seatbelts are not in doubt. . . . " *State Farm*, 463 U.S. at 52. However, manual seat belts are "active restraints," because the occupant must

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[11] The Safety Act recently was recodified so all "laws related to transportation [appear] in one comprehensive title," and moved from Title 15 to Title 49 of the United States Code. H.R. Rep. No. 108, 103d Cong., 2d Sess. 3 (1994), *reprinted in* 1994 U.S.C.C.A.N. 818, 820. In the course of the recodification, there were some "technical improvements" to language to promote "clarity" and "consistency," and avoid "surplusage"; "precautions [were] taken against making substantive changes in the law." *See id*; 49 U.S.C.A. § 30103, Historical and Statutory Notes. The preemption case law discusses the provisions as codified before: To avoid confusion, this brief does also.

act to use them, and after the original FMVSS 208 issued, many people did not use them. Therefore, in 1972 the Department amended FMVSS 208 prospectively to require installation of airbags or automatic belts in cars built after August 15, 1975. The Department also required "vehicles built between August 1973 and August 1975 . . . to carry either passive restraints or [manual] lap and shoulder belts coupled with an 'ignition interlock' that would prevent starting the vehicle if the belts were not connected." *State Farm*, 463 U.S. at 35.

There was a public outcry against ignition interlocks, and in 1974 Congress enacted 15 U.S.C. § 1410. It outlawed the "ignition interlock" standard, mandated that manufacturers retain the option to install manual seat belts, and prohibited a standard requiring airbags or any other nonbelt restraint system unless, among other things, such a standard had been submitted first to both houses of Congress and not disapproved by them. 15 U.S.C. §§ 1410b(b), 1410b(c). Congress authorized a standard permitting manufacturers to install nonbelt restraint systems, but only if the standard also permitted the manufacturers to install manual belt systems instead. 15 U.S.C. § 1410b(b)(3)(A).[12]

Congress' purpose, and § 1410b's effect, are clear: (1) Nothing more than seat belts and a warning signal were required because more was "not justified." 120 Cong. Rec. 27816, 27822 (1974) (remarks of Representative Wyman, author of amendment that became § 1410b). (2) The Secretary was therefore to permit manufacturers the option to install manual seat belts. (3) The Secretary "could permit a manufacturer (at his option) to comply with a standard with a nonbelt system instead of a belt system." H.R. Conf. Rep. No. 1452, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 6084,

[12] A "belt system" under the Act is a manual belt system. *See* H.R. Conf. Rep. No. 1452 at 6108; 120 Cong. Rec. 27816, 27882 (1974).

6108. But (4) the Secretary could not take away the manufacturer's option to install manual seat belts without Congress' assent.[13]

ii. The Options.

Accordingly, on October 31, 1974, the Secretary amended FMVSS 208 to delete the ignition interlock requirements. 39 Fed. Reg. 38380 (1974). As amended, FMVSS 208 granted manufacturers three options: (1) passive restraints for front and lateral crashes; (2) passive restraints for front crashes plus lap belts for side crashes and rollovers; or (3) manual seat belts. Those were the same three options FMVSS 208 provided before the ignition interlock episode. Thereafter, FMVSS 208 granted those same "three options," 41 Fed. Reg. 36494 (1976), and rejected a mandatory passive restraint rule, in every model year from 1976-1987.

b. 1976-1984: Transportation Secretaries Reject Mandatory Airbags.

i. 1976: Secretary Coleman.

Secretary Coleman undertook a comprehensive study of passive restraints. He determined not to mandate them, and instead reaffirmed the manufacturers' "option" to install manual belts. 41 Fed. Reg. 24070, 36494 (1976); 42 Fed. Reg. 5071 (1977). The reasons were these:

Public Acceptance. A policy "unacceptable" to the public would be contrary to the "goal of motor vehicle safety," and "[e]very sampling of public opinion" showed most Americans did not want mandatory passive restraints. The Secretary's Decision Concerning Vehicle Occupant Crash Protection, D.O.T., Dec. 6, 1976 at 6, 11, 32, 52-57 ("Secretary's Decision").

Development of Technology and Data. It was important to "foster[ ] the continued development of passive restraint

[13] Even if the legislative veto aspect of § 1410b fails (*see I.N.S. v. Chadha*, 462 U.S. 919 (1983)), Congress' intent in § 1410b to preserve options is clear.

technology" and obtain more data before mandating them or any one of them. Secretary's Decision at 9, 12, 27, 34, 57.[14]

Increased Manual Belt Use. Education might increase manual belt use and so make passive restraints unnecessary; airbags provided no greater protection than seat belts, when used. *Id.* at 7, 13, 29, 33.

Disastrous Economic Consequences. Mandating passive restraints would, if the public rejected them, cause "disastrous economic consequences for the entire nation." *Id.* at 6, 7, 11.

Secretary Coleman concluded that the "overall goal of motor vehicle safety would not be served" by mandating airbags or any passive restraints "at this time." *Id.* at 30-32, 34, 36; *see also* 41 Fed. Reg. at 24070-71.[15]

ii. 1977-83: Secretaries Adams And Lewis.

Secretary Adams rejected an airbag-only standard again in 1977. He issued a prospective FMVSS 208 requiring some form of passive restraints to be phased into cars beginning in model year 1982. "The two principal systems that would satisfy the Standard were airbags and passive belts; the choice of which system to install was left to the manufacturers." *State Farm*, 463 U.S. at 379.

Secretary Adams was clear, however, that "a lead time of four full years should precede the [phase-in] requirement," (42 Fed. Reg. 34288, 34295 (1977)), and that the option to choose manual belts ought to stay in place, for all cars until the phase-in began, and for some until the phase-in was completed, for the same reasons Secretary Coleman cited: public acceptance, development of technology, and the need for additional data. *See, e.g.*, 42 Fed. Reg. at 34290-96, 61468; 46 Fed. Reg. 53420 (1981). *See also Pacific Legal*

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[14] The Secretary was particularly concerned about the "feasibility of manufacturing millions" of reliable passive restraints. 41 Fed. Reg. at 24072.

[15] Secretary Coleman planned a demonstration project to help answer the consumer acceptance question. Secretary's Decision at 6-9, 30-33. The program was canceled by his successor. *See State Farm*, 463 U.S. at 37.

Found. v. Department of Transp., 593 F.2d 1338, 1348 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979).[16]

In 1981, Secretary Lewis delayed the phase-in for one year by reason of the "economic situation," poor "consumer acceptance," and the need for more development time, particularly as to smaller cars (which, because of gas shortages, made up 90% of the new fleet). 46 Fed. Reg. 12034, 21174-75 (1981). In 1982, he rescinded the requirement altogether, and concluded that manufacturers should "continue to have the current option" to provide seat belts. 46 Fed. Reg. 53419-25 (1981).

This Court reviewed that rescission decision and, in 1983, remanded it. *State Farm*, above.

c. 1984-Now: The Rule In Force Today

On remand, Secretary Dole undertook a comprehensive review of all restraint systems, 49 Fed. Reg. 28962-63, 28984-86, 28991, 28996 (1984), and reached the "final rule" that applies (with some minor modifications) today. *State Farm Mut. Auto. Ins. Co. v. Dole*, 802 F.2d 474, 478 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 951 (1987) (upholding final rule). The rule called for careful implementation of passive restraint standards over time. Thus it required some kind of passive restraint (no one kind was required) in 10% of cars built in the 1987 model year, 25% of cars built in the 1988 model year, 40% of cars built in the 1989 model year, and

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[16] Secretary Adams' prospective mandatory passive restraint regulation was submitted to Congress and not disapproved by it. But Congress provided in the Department of Transportation's annual appropriation legislation for 1979 and 1980 that "[n]one of the funds appropriated under this Act shall be used to implement or enforce any standard or regulation which requires any motor vehicle to be equipped with an occupant restraint system (other than a belt system)." Dept. of Transportation and Related Agencies Appropriation Act, 1979, Pub. L. No. 96-131, § 317, 92 Stat. 435, 450 (1978); Dept. of Transportation and Related Agencies Appropriation Act, 1980, Pub. L. No. 95-335, § 317, 93 Stat. 1023, 1039 (1979). "Belt System" meant the "active restraint system, which is the lap-shoulder belt system that we have on cars today." 125 Cong. Rec. at 36924-25 (1979).

100% of the cars built in the 1990 model year.[17] 49 Fed. Reg. at 28999-29000. That gradual phase-in was vital to promote a variety of different systems and to "encourage the development of [restraint] technologies." 49 Fed. Reg. at 28987, 28997, 29000.

Secretary Dole determined not to mandate any particular form of passive restraint at any time. She reasoned that each passive restraint system had different virtues, 49 Fed. Reg. at 29001, and found that "public acceptability" of mandatory passive restraints would be enhanced by authorizing manufacturers to install different restraint systems, so the public could choose among them. *Id.* at 28997, 29001. The Secretary found a "number of reasons" not to mandate airbags in particular, *id.* at 29000, including these: (1) "An airbag alone is less effective" than three-point belts when used, 49 Fed. Reg. at 28986; (2) airbags are costly, especially to replace, *id.* at 29001; (3) airbags may not protect out-of-place occupants and, in fact, might cause injuries, especially to children, *id.* at 28992, 29001; and (4) the public feared airbags and might not accept them. *Id.* at 29001.

Secretary Dole concluded that state enactment of MULs (n.___, above) was a better way to achieve the safety goal than mandating any form of passive restraint. She reasoned that seat belts, when used, are more effective than airbags alone, and greater use of seat belts is "the quickest, least expensive way by far to significantly reduce fatalities and

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[17] Even when that standard was adopted, passive restraints were the second choice. The Department found that greater manual seat belt use was the "quickest and least expensive way by far to significantly reduce fatalities and injuries," 49 Fed. Reg. at 28997, and determined to require the phase-in of passive restraints in 1987 only if states with two-thirds of the population had not enacted mandatory use laws ("MULs") by then. As the Government explained at the time, MULs "provide immediate and significant safety" that "no passive restraint requirement can possibly achieve," so "if sufficient MULs are enacted," mandating passive restraints "would not be appropriate." Government's Brief, *State Farm v. Dole*, Nos. 84-1301, 84-1459, and 84-1462, 802 F.2d at 474 (D.C.Cir.), at 18, 34-39. The Secretary further provided that any phase-in of passive restraints was to cease after it began if a sufficient number of states enacted MULs between 1987 and 1989; sufficient states did not enact them.

injuries. "*Id.* at 28997." And even when passive restraints were to be phased in, Secretary Dole determined that mandating airbags or any other single type of passive restraint "*runs the risk of killing or seriously retarding development of more effective, efficient occupant protection systems.*" *Id.* at 29001 (emphasis added).

The need for flexibility was particularly great as to passenger-side restraints. Indeed, in March 1987, Secretary Dole determined that "various technical, engineering and supplier resource problems" still existed with regard to passenger side airbags. 52 Fed. Reg. 10096 (1987). In November 1987, the Secretary reaffirmed that federal safety policy purposely did not "require manufacturers to install airbags, or any other particular type of automatic restraint system." 52 Fed. Reg. 42440, 42441 (1987). The Secretary noted that passenger-side airbags that had been put on the road were "overly aggressive," and also pointed out that it was "emphatically not the case" that the technology for passenger-side airbags was reasonably advanced, 52 Fed. Reg. at 42441-43. *See also Public Citizen v. Steed*, 851 F. 2d 444, 446-48 (D.C. Cir. 1988) (opinion by Ginsburg, J.).

The passive restraint phase-in began in 1987, because a sufficient number of states had not enacted MULs. In this model year (1995), the standard requires passive restraints in all passenger cars, but continues to grant the manufacturer the option as to what type of passive restraint to install.[18]

In sum, from the beginning to the passive restraint phase-in, FMVSS 208 granted – and Congress mandated – the option to install manual seat belts or passive restraints. Still today, FMVSS 208 grants manufacturers the option as to what

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[18] In 1991, Congress amended the Safety Act to require airbags prospectively in all passenger cars. Congress granted the Secretary until September 1, 1993 to promulgate an amendment to FMVSS 208 requiring airbags in 95% of all cars built in the 1997 model year, and 100% of cars built in the 1998 model year. *See* Pub. L. No. 102-240, § 2508.

Congress also made clear that its judgment that airbags should be required in the regulations of the future was not to change the preemption case law as to the regulations of the past. Pp. 27-28, below.

passive restraint to install in cars, and does not mandate airbags or any other single passive system.

B. The Eleventh Circuit's Decision Guts The Supremacy Clause And Violates This Court's Pre-emption Decisions.

1. State Law That Directly Conflicts With Federal Law Is Preempted By Direct Operation Of The Supremacy Clause.

In *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1993), this Court held that where an Act's preemption clause provides "a 'reliable indicium of congressional intent with respect to state authority,' " and where "other provisions" of the Act "offer no cause to look beyond" the preemption clause, there is no "need" to look beyond it. 112 S. Ct. at 2618. The *Myrick* majority misread that language to add a "new wrinkle to the fabric of pre-emption law," and a "clear instruction that when there is an express pre-emption provision we should not consider implied pre-emption," even in the face of a direct conflict between state and federal law, or even where a state-law rule makes compliance with federal law impossible. 13 F.3d at 1521-22.

In fact, the language from which the *Myrick* majority inferred that "new wrinkle" is not new at all. That language is at least 14 years old. *See e.g., California Federal Savings & Loan Assn. v. Guerra*, 479 U.S. 272, 282 (1987) ("[T]here is no need to infer congressional intent to pre-empt state laws from the substantive provisions of Title VII; these two [pre-emption] sections provide a 'reliable indicium of congressional intent with respect to state authority' to regulate employment practice") (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978)). It never before was imagined to preclude conflict preemption analysis, much less mandate that state law prevails and federal law falls (the opposite

of what the Supremacy Clause commands) when a state law directly conflicts with federal law.[19]

The Supremacy Clause provides that federal law is the "supreme law of the land." Therefore, a state law that conflicts with federal law "is pre-empted by direct operation of the Supremacy Clause." *Brown v. Hotel & Restaurant Employees and Bartenders Int'l Union*, 468 U.S. 491, 501 (1984). Indeed, "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Free v. Bland*, 369 U.S. 663, 666 (1962). That basic rule is as old as the Republic, and *Cipollone* certainly did not change it, much less by dint of a passing sentence that echoed settled law.

Indeed, the Court's own analysis – just before and then after *Cipollone* – confirms that the basic rule is still the law. Just a week before *Cipollone*, this Court found that a state law "in conflict" with federal law was impliedly preempted despite an express preemption clause, and, quoting *Free v.*

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[19] *Myrick* also cited, as support for its rule foreclosing conflict preemption, *CSX Transp., Inc. v. Easterwood*, 113 S. Ct. 1732 (1993). *CSX* considered whether the Federal Railroad Safety Act (FRSA) preempts state tort claims regarding a warning device at a railroad crossing. The FRSA has an express preemption clause that bars any state law requirement that relates to railroad safety when there is a federal "rule, regulation, order, or standard covering the subject matter of such State requirement." 45 U.S.C. § 434. The Court stated that "[i]f the statute contains an express pre-emption clause, the task of statutory constriction must *in the first instance* focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." 113 S. Ct. at 1737 (emphasis added). The Court looked at the federal regulations at issue, judged that they did not cover the same subject matter as the tort claims, and so held that those claims were not expressly preempted. 113 S. Ct. at 1742. The Court then "reject[ed] petitioner's claim of implied 'conflict' preemption, * * * on the basis of the preceding analysis." 113 S. Ct. at 1742 n.12.

The *Myrick* majority read that to mean a "separate implied pre-emption analysis" was precluded because the statute contains an express preemption clause. 13 F.3d at 1524. But we submit that Judge Hill, in dissent, read *CSX* correctly: the Court simply found that federal law did not "cover" the same subject as the state common law in issue, and accordingly "did not conduct an implied conflict pre-emption analysis because . . . it found no conflict" between state and federal law. *See* 13 F.3d at 1530 (Hill, J., dissenting).

Bland, reaffirmed that basic rule. *Gade v. National Solid Waste Management Ass'n*, 112 S. Ct. 2374, 2388 (1992).[20] Just last year, this Court "discern[ed] no solid basis for believing that Congress," when it included both a preemption clause and a savings clause in an Act, "intended fundamentally to alter traditional preemption analysis." *John Hancock Mutual Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517, 526 (1993). Thus, it held that the saved state law "generally is not displaced, but 'where [it] stands as an obstacle to the accomplishment of the full purposes and objectives of Congress,' federal preemption occurs." *Id.* (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)).

In a long line of preemption decisions, this Court has considered – and, indeed, adopted – implied preemption arguments under statutes with express preemption clauses. *See, e.g., Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139-42 (1990) (ERISA); *Northwest Cent. Pipeline Corp. v. Kansas Corp. Comm'n*, 489 U.S. 493, 509-22 (1989) (Natural Gas Act); *Jones v. Rath Packing Co.*, 430 U.S. 519, 538-43 (Fair Packing and Labeling Act), *reh'g denied*, 431 U.S. 925 (1977).[21] In fact, over a century of case law makes clear that, even where an act has a common-law savings clause and no preemption clause at all, the Supremacy Clause preempts state common law that directly conflicts with federal law. Thus in *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907), the Supreme Court held preempted a conflicting common-law claim in the face of a savings clause, because a savings clause "cannot in reason be construed as

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[20] *Gade* also observed that "our pre-emption categories are not 'rigidly distinct.' " 112 S. Ct. at 2386, n.2. *Myrick* comments that *Gade* was decided by a plurality. 13 F.3d at 1523. But 3 of the 4 members of that plurality (Chief Justice Rehnquist, and Justices White and O'Connor) were also members of the *Cipollone* plurality whose language *Myrick* relied on.

[21] As Justice Souter observed last Term, "whether or not Congress has used any special 'preemptive' language, state regulation must yield to the extent it actually conflicts with federal law." *BFP v. Resolution Trust Corp.*, 114 S. Ct. 1757, 1776 (Souter, J., dissenting, joined by Blackmun, Stevens, and Ginsburg, JJ.), *reh'g denied*, 114 S. Ct. 2771 (1994).

continuing . . . a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act." *See also International Paper Co. v. Ouellette*, 479 U.S. 481, 492-94, 493 n.13 (1987) (savings clause provided "[n]othing in this section shall restrict any right which any person . . . may have under any statute or common law;" Senate Report said "[c]ompliance with . . . Act would not be a defense to a common law action for . . . damages;" conflicting common law claims preempted; Congress could not have "intended to undermine . . . [the Act] through a general savings clause"). *Accord Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328-31 (1981); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 210-11 (1986); *Arrow Transp. Co. v. Southern Ry.*, 372 U.S. 658, 671 n.22 (1963); *T.I.M.E. Inc. v. United States*, 359 U.S. 464, 473-74 (1959); *Pennsylvania v. Nelson*, 350 U.S. 497, 501 n.10 (1956), *reh'g denied*, 351 U.S. 934 (1956); *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080, 1086 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 947 (1980). *See also Morales*, 112 S. Ct. at 2037 ("general 'remedies' savings clause cannot be allowed to supersede the specific substantive pre-emption provision"); *John Hancock*, 114 S. Ct. at 526 (saved state law "generally is not displaced, but 'where [it] stands as an obstacle to the accomplishment of the full purposes and objectives of Congress,' federal preemption occurs") (citing *Silkwood*, 464 U.S. at 248).

Myrick proposes that *Cipollone* changed all that law, without mentioning it, and with this startling consequence: (1) A state law that "interferes with and frustrates" federal law – in other words, flatly conflicts with it – is implicitly preempted absent any preemption clause in the federal statute the state law flatly conflicts with. But (2) that state law is not implicitly preempted if the federal statute the state law conflicts with contains a preemption clause and that clause does not expressly preempt the state law. So (3) a federal statute has greater preemptive force as to a conflicting state law if it does not have a preemption clause than if it does. In fact, (4) according to *Myrick*, "when there is an express pre-emption provision we should not consider implied pre-emption" at all,

even though a state law flatly conflicts with federal law, and indeed even when it is absolutely "impossible" to comply with federal law if one complies with the state law, and vice versa. 13 F.3d at 1519, 1522.

Cipollone did not hold that when Congress enacts a preemption clause, it gives the Act less preemptive force, not more, than the Act would have without the clause. And *Cipollone* did not overrule a century of authority, and the settled principles that authority lays down, without mentioning it.

2. The Safety Act Does Not Save Common-Law Claims That Directly Conflict With Federal Safety Standards.

The Eleventh Circuit majority in *Myrick* read the broad language of the preemption clause as if it were narrow, read the narrow language of § 1397(k) as if it were broad,[22] and

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[22] Thus, the circuit court treated the clause as a "savings" clause, even though it is not denominated a preemption clause; structurally is not part of the preemption clause; speaks only to compliance as a defense on the merits; has none of the traditional language in savings clauses; and says nothing on its face about preemption, much less purports to preclude preemption of claims based on a non-identical common-law standard that directly conflicts with a federal standard.

The circuit court then gave the so-called savings clause a broad reading, and reasoned that unless it saved all common-law claims, regardless of conflict with federal law, it would be " 'a mere redundancy.' " 13 F.3d at 1520 (citing *Taylor*, 875 F.2d at 823-825). That ignored the function traditionally ascribed to savings clauses: to show that Congress has not "occupied the field" of safety regulation, for savings clauses are meant "not to nullify other parts of the act, or to defeat rights or remedies given by preceding sections, but to preserve all existing rights which were not inconsistent with those created by the statute." *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915); *accord Chicago & N.W. Transp. Co.*, 450 U.S. at 328 (savings clause included because without it, " 'it might have been claimed that, Congress having entered the field, the whole subject . . . had been withdrawn from the jurisdiction of the state courts' ") (quoting *Puritan*, 237 U.S. at 130). Indeed, if *Myrick* were right that the existence of a preemption clause forecloses preemption of anything not covered by the clause, the so-called savings clause would serve no purpose at all.

concluded that language in the two clauses that it had previously found "ambiguous" and "conflict[ing]" nonetheless provided such a "reliable indicium" of Congress' preemptive intent that they foreclosed any inquiry into whether state and federal law conflict. The majority's decision is wrong to start with because, properly read, the preemption clause expressly preempts common law claims.[23] But even if that were not so, the converse – that the preemption clause is a reliable indicium of Congress' intent not to preempt claims that flatly conflict with an FMVSS – is certainly wrong.

Even before *Cipollone*, all four circuits to address the question concluded that § 1397(k), treated as a savings clause, shows that the preemption clause, § 1392(d), is not a "reliable indicium" of Congress' preemptive intent – either way – on the matter at hand, and so "offers cause to look beyond" § 1392(d). As the First Circuit summed it up, the "Safety Act is thus ambiguous as to . . . whether a state product liability claim . . . which seeks to hold an automotive manufacturer liable for failing to adopt a standard 'not identical' to a federal safety standard covering the 'same aspect of performance' . . . is *preserved* by section [1397(k)] [or] preempted by § 1392(d)." 865 F.2d at 398 (emphasis in original). *Accord Taylor*, 875 F.2d at 825 (finding "conflict between the language of the Safety Act's preemption and savings clauses" and "conclud[ing] that the Safety Act cannot be construed as

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[23] The circuit court endorsed its pre-*Cipollone* holding that common law claims did not fall within the Safety Act's express preemption provision because Congress failed to " 'make explicit reference to state common law in the Act's preemption clause.' " 13 F.3d at 1520 (875 F.2d at 824). But that rationale was repudiated by *Cipollone*. 112 S. Ct. at 2619-21. Indeed, many courts, both before and after *Cipollone*, have found that the preemption clause expressly preempts common-law claims based on a standard that conflicts with an on-point FMVSS. *See Miranda*, 647 A.2d at 174; *Boyle*, 501 N.W.2d at 869; *Gills*, 829 F. Supp. at 898-99; *Montag*, 856 F. Supp. at 577; *Nissan v. Superior Court*, 212 Cal. App. 3d at 982; *Vanover*, 632 F.Supp. at 1096-97; *Cox*, 646 F.Supp. at 763; *Wickstrom*, 416 N.W.2d at 840; *Wattelet*, 676 F. Supp. at 1040.

Petitioners and other amici address express preemption at length, so we will not address it further here.

unambiguously manifesting an intention to preempt appellants' common law claims."); *Pokorny*, 902 F.2d at 1121; *Kitts*, 875 F.2d at 789 (following *Wood*); *Heath*, 756 F. Supp. at 1147 (the "savings clause, when considered in combination with the preemption clause, makes ambiguous Congress' intent with respect to preemption of state common law claims").

Even if the Safety Act's preemption clause does not expressly preempt conflicting claims, at a minimum *Cipollone* adds force to the clause, and so sharpens the conflict that the courts already had found between the preemption clause and the savings clause. Consequently, at a minimum *Cipollone* underlines the ambiguity of each, and accordingly, far from foreclosing implied preemption analysis, compels it. *See, e.g., Boyle*, 501 N.W.2d at 871 ("Because the explicit preemption clause and the savings clause appear to conflict, neither clause 'provides a reliable indicium of congressional intent with respect to state authority.' The existence of two clauses dealing with preemption that appear to conflict compels us to look beyond the express preemption provision.") (quoting *Cipollone*); *Marrs*, 852 S.W.2d at 575-76; *Gills*, 829 F. Supp. at 899.[24]

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[24] The implied preemption analysis is also compelled by the regulation itself, even apart from Congress' clashing messages in the Safety Act.. "Federal regulations have no less pre-emptive effect than federal statutes." *Fidelity Federal Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). "A pre-emptive regulation's force does not depend on express congressional authorization to displace state law." *Fidelity Federal Savings*, 458 U.S. at 154. The proper inquiry is "whether the federal agency has properly exercised its own delegated authority." *City of New York v. Federal Communications Commission*, 486 U.S. 57, 64 (1988). Thus, "[s]o long as an agency has statutory authority to issue regulations, those regulations will preempt inconsistent state [law] by the simple operation of the Supremacy Clause." *Lincoln Sav. and Loan Ass'n v. Federal Home Bank Bd.*, 856 F.2d 1558, 1560 (D.C. Cir. 1988). Here, NHTSA acted under a broad delegation of congressional power. See 15 U.S.C. §§ 1381, 1392(a), 1407. NHTSA acted within its authority in granting FMVSS 208's options. *Public Citizen*, 851 F.2d at 450; *State Farm Mutual Ins. Co. v. Dole*, 802 F.2d 474 (D.C. Cir. 1986), *cert. denied*, *New York v. Dole*, 480 U.S. 951 (1987). That federal option-based regulation preempts state law claims that would take any of the options away. Pp. 23-24, below.

In sum, after *Cipollone*, there are two alternatives: Either: (1) the Safety Act's preemption clause expressly preempts common law claims that conflict with an on-point FMVSS, an argument that *Cipollone* makes even more forceful; or (2) the preemption clause, taken with the savings clause, is not a "reliable indicium" of Congress' intent, so there is "cause to look beyond" it to implied preemption. But again: regardless whether a statute contains a preemption clause, a state law that flatly conflicts with the statute or regulations promulgated under it is preempted by direct operation of the Supremacy Clause.

C. All Three Branches Of Government Have Found That "No Airbag" Claims Are Preempted.

The issue in any conflict preemption case is whether Congress intended to preempt a state law that, as applied in the case at hand, flatly conflicts with the federal statute – or regulation under the statute – that contains the clause. The inquiry is necessarily case specific, for whether a given claim based upon a state law conflicts with federal law turns on the claim, the state law, and the federal law. Indeed, that is the vice of *Myrick*; it prevents courts from even considering the particular conflict at issue in any case where the federal law contains a preemption clause, no matter how strong the conflict in that case between the state and federal law, and however the state law frustrates the federal law's purpose or the methods chosen to meet its purpose.

FMVSS 208 and the "no airbag" claims that undermine it present the paradigm conflict preemption case, and illustrate the folly of *Myrick*'s preclusion of implied conflict preemption analysis – whatever the case. FMVSS 208 is a "unique" regulation, and "no airbag" claims are unique in Safety Act litigation. *See, e.g., Gills*, 829 F. Supp. at 897 (referring to FMVSS 208's "unique characteristics"); *Welsh v. Century Products, Inc.*, 745 F. Supp. 313, 321 (D. Md. 1990) ("FMVSS 208 is an unusual regulation"). To start with, the Safety Act, § 1410(b), mandates that NHTSA grant manufacturers restraint system options; no other provision of the

Safety Act mandates options. FMVSS 208, in turn, expressly grants manufacturers a choice among restraint system options and its regulatory history recites that the options are an essential means to achieve the federal safety goal; other FMVSSs do not expressly grant such specific options, or share FMVSS 208's rich regulatory history regarding the need for and purpose of them. *See* pp. 7-14, above.

Moreover, most Safety Act standards are performance, not design, standards. The "usual common law action for design defect," however, "creates a design standard rather than a performance standard." Therefore, a "direct conflict between a common law design standard and a Safety Act performance standard" is a "rare event indeed." *Wood*, 865 F.2d at 402 n.9, 416.

"No airbag" claims present that "rare event" for at least three reasons. First, "no airbag" claims, if allowed, would take away the options FMVSS 208 grants. Pp. 23-24, below. Second, FMVSS 208 sets forth detailed design requirements with respect to restraint systems; accordingly, FMVSS 208, in contrast to most other FMVSSs, "has elements of a design standard." 865 F.2d at 417. Third, "no airbag" claims "potentially affect[ ] every vehicle on the road." 865 F.2d at 418. For every car has a restraint system, and every restraint system is a potential target when someone is injured in a car accident. If people can second-guess the federal restraint system option chosen for every car, every accident becomes a potential "no airbag" case. Accordingly every case becomes an invitation to jury arrogation of the power to review, and transform, federal rulemaking.

Consequently, "no airbag" claims would "establish what is in practical effect a new safety standard" creating a "direct conflict" with the federal standard. *Wood*, 865 F.2d at 402, 406, 418. Not surprisingly, then, all three branches of the United Sates government have concurred that, whatever the effect of other regulations, FMVSS 208 preempts claims that would take away the options it grants.

1. The Courts Have Overwhelmingly Held That FMVSS 208 Preempts "No Airbag" Claims.

An overwhelming body of case law – essentially unanimous until *Myrick* – found "no airbag" claims preempted. Some reached that conclusion by the express preemption route, most by the implied preemption route. Both are sound.

We address the implied preemption authority here. "No airbag" claims conflict with the purposes and methods of Congress and the Department of Transportation, and so are subject to implied preemption, in at least two ways.

a. Ground 1: A State Rule Imposing Damages For Choosing To Install One FMVSS 208 Authorized Restraint System Instead Of Another Punishes The Exercise Of A Federal Option.

FMVSS 208 gives manufacturers the right to choose any of the restraint systems sanctioned by it. FMVSS 208 permits that flexibility and grants those options because Congress, by § 1410(b), and the Department of Transportation judged that it should. Pp. 7-9, above. *See Pokorny*, 902 F.2d at 1123-24 ("Section 1410b shows, *inter alia*, that Congress intended manual seat belts to remain one of the options"). The Department balanced costs and benefits, and determined that permitting manufacturers to choose among options rather than mandating one would "provide sufficient latitude for industry to develop the most effective [restraint] systems." 49 Fed. Reg. at 28997, 29001, *quoted in Baird*, 654 F. Supp. at 32. The Department determined the converse was also true: "Restricting the manufacturers" to a single choice, like airbags, risks "killing or seriously retarding development of more effective, efficient occupant protection systems." 49 Fed. Reg. at 28962, 28997, 29001; pp. 11-13, above. "Thus, the intent of the regulatory scheme is to provide flexibility in the development of technologies to improve automotive safety." *Baird*, 654 F. Supp. at 32.

"No airbag" claims, if allowed, would permit a jury to impose damages on a manufacturer because it chose the seat

belt option, instead of the airbag option. A state common-law standard imposing damages on a manufacturer for choosing a federally-granted option in effect takes away that option and, with it, the manufacturer's flexibility. That standard also punishes a manufacturer, after the fact, for doing what FMVSS 208 authorized the manufacturer to do. Consequently, that standard would defeat Congress', and the Department's, full and most basic objectives.

Therefore, "no airbag" claims are preempted. As this Court made clear in *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 155 (1982), a "state common law rule cannot take away the flexibility provided by a federal regulation," "cannot prohibit the exercise of a federally granted option," and cannot impose damages for doing "what a federal act or regulation 'authorized [one] to do.' " *Taylor*, 875 F.2d at 827. *Accord Pokorny*, 902 F.2d at 1125; *Wickstrom*, 416 N.W.2d at 841; *Baird*, 654 F. Supp. at 32; *Cox*, 646 F. Supp. at 763-64; *Dallas*, 725 F. Supp. at 906. In sum, "a state common law rule that would, in effect, remove the element of choice authorized in [FMVSS 208] would frustrate the federal regulatory scheme," and so is "impliedly preempted." *Taylor*, 875 F.2d at 827. *See Buzzard v. Roadrunner Trucking, Inc.*, 966 F.2d 777, 783 (3d Cir. 1992) ("an action asserting liability for choosing one of the three passive restraint options section 1410b and Standard 208 named instead of another would frustrate the regulatory framework and undermine the flexibility that Congress and the Department of Transportation intended to give to manufacturers in deciding whether to include air bags, automatic or manual seat belts in their design").

b. Ground 2: Permitting States To Limit The Exercise Of A FMVSS 208 Option Would Destroy The Uniformity The Act Is Meant To Achieve.

Congress intended uniform federal motor vehicle safety standards that apply everywhere. *Wood*, 865 F.2d at 412; *Kitts*, 875 F.2d at 789 (quoting *Wood*). Indeed, that is why

§ 1392(d) is in the Safety Act. *Wood*, 865 F.2d at 412. P. 6, above.

FMVSS 208 grants manufacturers the option to choose among restraint systems, specifically including the option to install seat belts, and not airbags. That standard applies nationwide. A state regulation requiring the installation of a system with airbags instead of manual or automatic seat belts would not be "identical" to that nationwide standard, and instead would conflict with it. That state regulation would therefore effect nonuniformity. Accordingly, § 1392(d) would preempt it. *Wood*, 865 F.2d at 408-09.

"No airbag" claims would have the same effect as the forbidden regulation. As *Cipollone* holds, " '[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.' " 112 S. Ct. at 2620 (quoting *Garmon*, 359 U.S. at 247). A claim based on a rule requiring airbags would be "tantamount to establishing" a "conflicting" state regulation requiring airbags, and have essentially the same "effect." *Wood*, 865 F.2d at 401-02, 410-11, 418 (citing *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 627 (1st Cir. 1987)).

Therefore that claim "would destroy the uniformity of the federal standard, and exceed the Safety Act's prescribed role for state regulation." *Wood*, 865 F.2d at 412; *Kitts*, 875 F.2d at 789; *see also Staggs*, 678 F. Supp. at 272; *Nissan Motor Corp.*, 212 Cal. App. 3d at 982; *Wickstrom*, 416 N.W.2d at 841; *Hughes*, 677 F. Supp. at 77-78. Indeed, Congress' purpose to ensure uniform national standards "would be entirely frustrated by" that claim. *Cox*, 646 F. Supp. at 763-64. Accordingly, it is preempted. *See also Ouellette*, 479 U.S. at 496-97 (finding implied preemption because permitting common-law suits along interstate waterways would subject water discharger to a "variety of common-law rules" and so "undermine" Congress' purpose to ensure " 'clear and identifiable' " standards); *Chicago & N.W. Transp. Co.*, 450 U.S. at 326 ("A system under which each State could, through its courts, impose . . . its own version of reasonable service requirements could hardly be more at odds with the uniformity contemplated by Congress").

Logic compels that result, and so does real life. If a jury in one state could require airbags, and so impose a different standard from FMVSS 208, so could juries in other states. The upshot would be a patchwork of different restraint standards in different states – airbags here, manual belts there, automatic belts somewhere else – as juries saw fit, on the basis of whatever was before them from time to time. Indeed, a car lawful in one state would become unlawful when driven to another. *See Hughes*, 677 F. Supp. at 77-78 ("the vagaries of jury standards of safety could result in a different result in each suit brought"). That "type of ad hoc regulation is exactly what Congress sought to exclude. . . . " *Vanover*, 632 F. Supp. at 1096. *Accord, Wood*, 865 F.2d at 413; *Kitts*, 875 F.2d at 789; *Wickstrom*, 416 N.W.2d at 841; *Staggs*, 678 F. Supp. at 272; *Hughes*, 677 F. Supp. at 77-78; *Cox*, 646 F. Supp. at 763-64.

2. The United States Has Stated Its View That FMVSS 208 Preempts "No Airbag" Claims.

In 1990, the Solicitor General, joined by counsel for NHTSA and the Department of Transportation, filed a brief in this Court opposing certiorari in several federal circuit court cases finding FMVSS 208 preemption. The brief explained that diversity was a "critical feature" of Secretary Dole's version of FMVSS 208, and that it reflected "the Secretary's policy judgment that safety will best be promoted if manufacturers install *alternative* protection systems in their fleets, rather than one particular system in every vehicle." Brief for the United States as Amicus Curiae, *Wood v. General Motors Corp.*, No. 89-46 (U.S. Sup. Ct., filed March 1990), at 13.

The brief concluded that claims imposing damages for a manufacturer's failure to install one passive restraint system, instead of another, would "obviously eliminate the diversity that the Secretary found necessary," would therefore "*disserve* the *safety* purposes of the Act," and so would "stand[ ] as an obstacle" to the agency's objectives, in fact "drastically" interfere with them. *Id.* at 14, 15 (original emphasis).

> [A] critical feature of FMVSS 208 is the Secretary's policy judgment that safety will best be promoted if manufacturers install *alternative* protection systems in their fleets, rather than one particular system in every vehicle.
>
> . . . If manufacturers are held liable for not installing airbags, the burden of paying sizable compensatory and punitive damages awards along with "[t]he centralized, mass-production, high volume character of the motor vehicle manufacturing industry in the United States," [citation omitted] is likely to lead auto makers to install airbags in all cars. That outcome would obviously eliminate the diversity that the Secretary found necessary to promote motor vehicle safety. At the least, holding a manufacturer is liable for not installing airbags would drastically "interfere[ ] with the methods by which [FMVSS 208] was designed to reach [its] goal." [citation omitted] Under these circumstances, design defect tort actions would "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of [the agency]," [citation omitted] and thus would be preempted by federal law. . . . It is that policy of affirmatively encouraging diversity that would be disrupted by tort liability, which therefore would be preempted.

Id. at 13-15 (original emphasis). Thus, the Solicitor General, NHTSA and the Department of Transportation concluded, "no airbag" claims are "impliedly preempt[ed]." *Id.* at 7.

3. Congress Expressly Stated Its Intent Not To Change The Preemption Case Law Under FMVSS 208.

At NHTSA's request, and again unique in Safety Act litigation, Congress has expressed its intent not to change the case law preempting "no airbag" claims.

Congress amended the Safety Act in 1991 to require airbags, beginning in 1997. *See* Pub. L. No. 102-240, § 2508. The House Conference Report recites that NHTSA alerted Congress that "most courts that have considered the matter have ruled that ["no airbag" claims] are preempted by the [Safety Act] and/or the safety standards issued by NHTSA." Nov. 7 Letter from NHTSA, cited in H.R. Rep. No. 404, 102nd Cong., 1st Sess. 403 (1991), *reprinted in* 1991 U.S.C.C.A.N. at 1783. NHTSA also cautioned Congress that the amendments could call these preemption rulings into question, and that if Congress adopted a mandatory-airbag rule, it was "possible that some courts would conclude that these claims are no longer preempted." *Id.*

Congress responded by specifying that the 1991 amendment requiring airbags prospectively

> shall [not] be construed by any * * * court as indicating an intention by Congress to affect, change, or modify in any way the liability, if any, of a motor vehicle manufacturer under applicable law relative to vehicles with or without inflatable restraints.

Pub. L. No. 102-240, § 2508(d).

Thus, having been specifically apprised of the overwhelming authority finding claims like plaintiff's preempted, Congress expressly did "not want by this section to change" those cases. H.R. Rep. No. 404 at 403. Congress' express acceptance of the case law interpreting the preemptive reach of FMVSS 208 confirms that its legislative intent was properly gauged by that case law. *See, e.g., NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *Tiger v. Western Investment Co.*, 221 U.S. 286, 309 (1911).

* * * *

In sum, whether a given claim conflicts with a given regulation, and so is preempted, turns on the regulation and the claim. Thus, for example, the courts have held that FMVSS 108 does not preempt some claims about illumination devices that do not conflict with an FMVSS 108 performance standard, whereas FMVSS 208 does preempt "no airbag" claims. *Compare, e.g., Pokorny*, 902 F.2d at 1125 (3rd Cir. 1990) (Third Circuit finds FMVSS 208 preempts), *with Buzzard*, 966 F.2d at 783 (same court finds FMVSS 108 simple performance standard does not preempt); *compare Kolbeck*, 702 F. Supp. 532 (Pennsylvania district court finds FMVSS 208 preempts), *with Swope v. SIT Transit Corp.*, 796 F. Supp. 160, 164 (E.D. Pa. 1992) (same court finds FMVSS 108 simple performance standard does not preempt because, unlike FMVSS 208, it "does not contemplate a flexible scheme that would be undermined by an imposition of common law liability"). *See also Cox*, 646 F. Supp. 761 (FMVSS 208 preempts), *and Welsh*, 745 F. Supp. at 321 (same court finds FMVSS 213 does not preempt claims concerning child safety seat design because, unlike FMVSS 208, FMVSS 213 "does not permit a manufacturer to choose among options").

Myrick's vice is that it reads *Cipollone* to preclude conflict preemption analysis whatever the federal law, and whatever the claim. The upshot is that *Myrick* would wipe out the overwhelming body of authority finding that FMVSS 208 preempts "no airbag" claims, without considering the law and claims that gave rise to the preemption conclusion. We submit that is a misreading of *Cipollone* and this Court's teachings over a century, and is the opposite of what the Supremacy Clause commands.

CONCLUSION

AAMA and AIAM respectfully submit that the Court should reverse the Eleventh Circuit's decision, and reaffirm that federal law prevails whenever state law directly conflicts with it. If the Court reaches the apparent conflict between FMVSS 121 and the plaintiff's claim in *Myrick*, however the Court rules as to it, we ask the Court to be mindful of the overwhelming authority finding "no airbag" claims pre-empted, and not to disturb it.

Respectfully submitted,

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